

It is essential, however, that hybrid systems, in which digital content is present but analog scrambling is relied upon, be recognized as a clear and present danger to the POD model. It is not enough for the Commission to recognize the proposed limitation; it must also task the OpenCable project with offering and implementing a timely and efficient solution. We believe that, by far, the best solution is an enhancement of the POD configuration where PODs are to be used in hybrid systems. The Decoder Interface alternative, developed (as NCTA recognizes) for a different purpose and fast becoming an orphan in terms of potential implementation, should be put to rest insofar as this proceeding is concerned.

C. The Definition of a Navigation Device Does Not Include Wireless Cable Antennas and Downconverters

WCA seeks clarification that the Commission's rules do not apply to wireless cable antennas and downconverters.⁵³ Circuit City supports this clarification because this equipment is part of the wireless cable provider's network and is not customer premise equipment. Consequently, such devices fall outside the definition of a navigation device. Circuit City does not believe that the FCC should adopt a formal demarcation point that would definitively establish whether a device constitutes a navigation device based on which side of the mark the device sits. Navigation device technologies and standards are in flux. It would be inappropriate to implement a bright line test, such as the one suggested by WCA, which could quickly become outdated. It would better serve the industry for the FCC to clarify that the scenario presented in WCA's Petition is not subject to § 629 and to address similar questions on an individual basis.

V. Regulatory Symmetry Demands That OVS Operators Be Covered By The FCC's Navigation Device Rules

In its *R&O*, the Commission found that § 653(c)(1) excludes OVS operators from the requirements of § 629.⁵⁴ Circuit City agrees with Time Warner that the FCC should require that OVS MVPDs that have technologically configured their systems as cable systems comply with the Navigation Device rules.

⁵³ WCA Petition at 6.

⁵⁴ *R&O* ¶ 23.

As recently as June of this year, the Commission has referred to OVS operators in the list of entities that are considered MVPDs.⁵⁵ The Commission also characterizes OVS operators as competitors to other MVPDs subject to § 629.⁵⁶ Circuit City believes that it is unfair that the FCC has excluded a single type of MVPD from the Navigation Device rules while all other MVPDs are required to comply. This creates an unlevel playing field that will give OVS operators a competitive advantage over other MVPDs. The fact that OVS is a service that allows the powerful Bell Operating Companies to enter the video market only adds to the concern that this regulatory disparity could have significant competitive implications.

Section 629 is written as a broad mandate applicable to all MVPDs.⁵⁷ Contrary to the FCC's finding, Circuit City agrees with Time Warner's analysis that Congress did not intend for § 653 to be read as a bar to the Commission's authority to apply its § 629 rules to OVS entities.⁵⁸ Had the FCC determined that § 629 only applied to cable operators, then the Commission's analysis would be correct. However, because the FCC has applied its Navigation Device rules to all other MVPDs, the regulations are no longer solely "cable operator" regulations. Thus, the FCC must reconsider its decision and require OVS operators to comply with the Navigation Device rules.

VI. OpenCable Is The Proper Forum For Developing Navigation Device Standards

CEMA argues that the Cable Consumer Electronics Compatibility Advisory Group

⁵⁵ *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 98-102, *Notice of Inquiry*, ¶ 4 (Released June 26, 1998).

⁵⁶ *See, e.g., Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, CC Docket No. 92-297, *Second Report and Order, Order on Reconsideration and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 12545, 12617 (1997) ("For multichannel video distribution, likely sources of competition include open video systems (OVS), MMDS, DBS, FSS program distributors, and satellite master antenna television systems."); *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 97-141, *Fourth Annual Report*, 13 FCC Rcd 1034 (1998).

⁵⁷ *R&O* ¶ 22 ("There is no basis in the law, or the record of this proceeding, to support a conclusion that the statutory language [in § 629] does not include all [MVPDs].").

⁵⁸ Time Warner Petition at 15-21.

("C³AG"), which was established to advise the FCC on compatibility questions, should share responsibility for setting standards to open the cable device monopoly.⁵⁹ WCA also argues for admittance into the Open Cable process. Circuit City believes the FCC was correct in placing a heavy and immediate responsibility on the proprietors of the cable monopoly to devise a means of opening it to competition. However, OpenCable must allow all interested parties affected by the outcome of the OpenCable process to play an active role in the development of standards.

A. OpenCable Must Bear the Responsibility for the Success of the OpenCable Project

As we argue with respect to the importance of the POD phaseout, Circuit City believes that the key action of the Commission in this proceeding was to assign *responsibility* for the success of the POD interface to a particular industry and, further, to the OpenCable business entity. This is critical to any market-based remedy, and to holding anyone accountable for the success or failure of the effort. The flaw in CEMA's proposal is that if, instead, the C³AG – which must operate as a due process, multi-industry organization – were given responsibility, then *everyone* – which is to say *no-one* – would be accountable.

From the beginning of this proceeding, Circuit City has argued that accountability is a key issue. If MSOs do not comply with the requirement to make PODs available to their customers by July 1, 2000, they must be held accountable by the FCC through loss of certification for non-POD devices until the POD responsibility has been met. Given such accountability, it is only fair to the MSOs that they retain the responsibility for their own success or failure in avoiding such sanction.

Circuit City and its affiliates have been longtime participants in C³AG activities. It must operate by multi-industry consensus, which means that often, in the absence of direct FCC administration, it does not (despite the best efforts of those involved) operate at all. Moreover, the C³AG was established as a *CE-Cable* compatibility forum, so it does not include any representatives of the Information Technology industry. Broadening this forum further, as would be necessary, would further dilute the responsibility.

⁵⁹ CEMA Petition at 11.

B. Non-OpenCable Members Must be Allowed to Participate in the Development of Standards in a Meaningful Way

Notwithstanding the above, the FCC must reaffirm the importance of industry involvement in the OpenCable process.⁶⁰ The members of the consumer electronics industry, the IT industry, WCA and, of course, vitally interested retailers should be meaningfully consulted, and have their views taken into account. Part of the OpenCable responsibility is to solicit and accommodate views of interested parties to the extent they serve competition and the public interest, even when these views may lead to results that are contrary to the interests of its members.

In addition, Circuit City believes that the FCC's commitment to the continued supervision of the OpenCable process will mitigate against the possibility that this effort will be unsuccessful. For example, the FCC has established rigorous reporting requirements for eight of the largest cable entities on the progress of their efforts to assure the commercial availability of navigation devices.⁶¹ The Commission has also acknowledged that if the voluntary process does not work, it is not averse to changing its approach.⁶² At this point in time, Circuit City believes that the FCC has established reasonable control over a process that is still developing. Unless there is concrete evidence that the standards process is in jeopardy, Circuit City believes that FCC should allow the OpenCable forum to continue with its efforts.

VII. Industry Standards And MVPD And Subscriber Demand Are Adequate Protections For Ensuring Equipment Manufacturer Conformance With The Navigation Device Rules

Time Warner proposes that the FCC forbid the use of the words "cable ready" on devices that are not OpenCable-compliant.⁶³ Circuit City believes that the OpenCable brand and logo will play an important role in the successful use of competitive devices by MVPD subscribers.

⁶⁰ Circuit City notes that the FCC understood at the time it issued the R&O that MVPD participation in the OpenCable process was limited to only part of the cable industry. *R&O* at n.20.

⁶¹ *R&O* ¶ 81.

⁶² *Id.* ¶ 125.

⁶³ Time Warner Petition at 10.

For example, consumers will come to understand that devices bearing the OpenCable logo will have met certain industry standards that ensure their quality and functionality. There is no need for the FCC to regulate the entrants. Again, the focus in this proceeding must be on opening a monopoly to competition; there is no basis in the record for so shackling the potential entrants.

The market will regulate the behavior of manufacturers that are interested in providing navigation devices. Manufacturers' equipment will not function unless it conforms to the specifications set through the OpenCable process. Subscribers will become disillusioned quickly with vendor equipment that does not work with their MVPD system. Finally, OpenCable will police the use of its logo to prevent dilution of its meaning by nonconforming users. These market forces will be more effective deterrents against nonconforming equipment than any mandate that the FCC might adopt regarding the use of the phrase "cable-ready." Thus, there is no need for the FCC to either encourage or ban other descriptions.

Similarly, there is no need for the FCC to adopt Time Warner's prohibitions against manufacturer and retailer actions that would block the reception of MVPD services.⁶⁴ Circuit City believes that the rules adopted in this proceeding are necessary to bring competition to the current monopoly market of MVPD-supplied devices. There is no basis in the record that equipment manufacturers or retailers have any incentive to take steps to sell equipment that will not allow the delivery of all MVPD services. The opposite is true. So long as MVPDs retain the ability to offer equipment that delivers all of their services, unaffiliated providers interested in competing with MVPD-supplied equipment will not be interested in providing navigation devices with any less capability.

Circuit City's position is based on the premise that Time Warner's proposal would apply equally to incumbent set-top box manufacturers and all new manufacturers of navigation devices. However, as discussed previously, Circuit City is also aware that MSOs are concerned that Scientific-Atlantic and General Instrument will delay development of the POD necessary to separate security from navigation devices. The FCC should take swift action against incumbent

⁶⁴ *Id.* at 11.

equipment manufacturers that take steps to impede the delivery of compliant PODs by July 1, 2000.

VIII. The FCC Cannot, And Should Not, Equate Copy Control Issues With Theft Of Service

Time Warner proposes that the FCC ban devices that can be used to frustrate copy control technology.⁶⁵ This proposal goes well beyond the scope of this proceeding –opening the market for devices that employ conditional access – to invite the FCC to police unrelated or only marginally related, and enormously complex, issues of copy control. Moreover, by its very breadth, the proposal would be impossible to implement: a device “capable of” being used to defeat copy control technology would include, for example, a personal computer. Consequently, the Commission should refrain from acting on Time Warner’s request.


⁶⁵ *Id.* at 14-15.

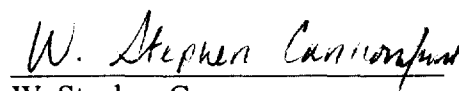
IX. Conclusion

For the foregoing reasons, Circuit City respectfully supports partial reconsideration by the Commission of its Navigation Device *R&O* insofar as it allows MVPDs to offer integrated devices after July 1, 2000, excludes OVS operators from the obligations required under § 629 and applies to analog-only systems meeting certain criteria. The remainder of the *R&O* should be reaffirmed with the clarifications set forth herein.

Respectfully submitted,

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September 23, 1998

Multichannel NEWS

See **BROADBAND WEEK** Page 57

Operators Worry About PODs

By **LESLIE ELLIS**

Cable operators raised warning flags last week, wondering if the two leading set-top manufacturers will protect their future revenues by introducing delays into a set-top scheme that the FCC recently mandated.

Three months ago, the Federal Communications Commission ruled that cable operators must decouple signal security from other set-top capabilities by July 2000.

Now, MSOs are concerned that General Instrument Corp. and Scientific-Atlanta Inc. — the two companies that essentially



POD CONCERNS: MSOs are wondering when set-tops such as Scientific-Atlanta Inc.'s Explorer 2000 (pictured) — as well as digital boxes from General Instrument Corp. — can be outfitted for removable security PODs.

own the signal-security and set-top segments for cable — will not stay on track with the removable security module, which is called a POD (point of deployment).

PODs will likely take the form of computer PCMCIA cards, not unlike plug-in telephone modems, and they will include conditional-access circuits, some memory, processing chips and similar ingredients.

Time Warner Cable went so far as to include language in its reconsideration petition filed with the FCC that extends the navigational-device rules to conditional-access-control vendors like GI and S-A, although the two were not named directly.

"It's a case where we don't
See **OPERATORS**, page 72

Attachment A

Operators Worry About PODs

Continued from page 1

want to be the only ones with the 'X' on our backs," said Mike Hayashi, vice president of advanced services for the MSO.

Both GI and S-A submitted that they will make the PODs at a pace that coincides with MSO plans.

Bill Wall, chief scientist and technical director for S-A's subscriber-networks division, said S-A "absolutely plans to make" PODs, as well as the set-tops that the PODs plug into.

The same goes for GI, according to Geoff Roman, executive

vice president for the manufacturer. "It's required. It's part of business going forward," he said.

But senior MSO executives wondered privately last week whether the vendors will drag their feet because of concerns about lost revenue.

"Both companies have privately indicated that they have no real interest in building the PODs," said one senior engineer with a top-five MSO. "This needs to get out. We're tired of being held hostage to these guys."

Another top-10 MSO execu-

tive, also speaking on condition of anonymity, said he wouldn't be surprised to see reluctance from the two vendors.

"I think that they're going to delay the POD as long as they can, because they think that otherwise, they're hosed," he said.

Manufacturer-induced delays, if they occur, could stem from simple revenue models, which, at first glance, don't appear to benefit either vendor.

PODs are expected to run in the \$50 to \$70 price range, said David Beddow, CEO of Telecommunications Inc.'s National Digital Television Center. The receptacle devices themselves — whether they are TVs or set-tops — will run upward of \$300.

And looming on the horizon to make the set-tops — which, by their very definition, are slated for retail shelves — are a long list of large consumer-electronics companies with strong brand presence.

Both GI and S-A said they are steadfast with their retail digital set-top plans, although neither has moved beyond introductory relationships with big consumer-electronics players. Sony Corp. owns a 5 percent interest in GI, and S-A has licensing arrangements with Pioneer New Media Technologies and Toshiba America Consumer Products.

Neither manufacturer has formalized retail plans with those partners, however.

"They seem to be stuck on the question of: Do set-top boxes go

away for good if the security gets put on a card that slides into a TV or VCR?" Hayashi and others said.

Said another MSO engineer, who requested anonymity: "I don't think [that S-A and GI] have convinced themselves that the market for them could actually be bigger with PODs." The engineer said MSOs will need PODs for the boxes that they rent to customers, and con-

*Some engineers
were confident
that GI and S-A
would still hook
up with retailers.*

sumers will need PODs for the boxes that they buy.

Still, neither GI nor S-A seemed overly concerned when they were contacted last week.

Although they are bitter competitors, the two vendors — contacted separately — agreed on one thing: Their market advantage lies in the fact that digital set-tops are part of an overall system.

"We incumbents have a lead [with end-to-end digital systems], for one," Roman said. "Two, we've seen the [consumer-electronics]

guys go at this business before ... and we're convinced that we'll be able to be very competitive."

Despite GI's and S-A's insistence that they'll make the PODs, neither company has a plan that it can discuss publicly.

"We're certainly not to a bill-of-materials [stage] yet," Roman said. Even if consumer-electronics vendors leapfrog set-tops, opting instead to find a way to load more value into TVs and VCRs, the financial impact on GI and S-A could take years to make a dent, said one industry analyst, who asked not to be quoted.

"Consider that the average life of a TV is, what, 15 years? And as a consumer, you're not going to run out and buy a TV just because it has this slot for a card," the analyst said.

Beddow said he remains confident in GI's long-term future. TCI — which could own up to 18 percent of GI through a complicated equity arrangement introduced early this year — placed a standing order with GI for 6.9 million digital boxes, which could swing much higher.

Asked whether GI or S-A face longer-term revenue trouble if they are reduced to selling \$70 cards instead of \$300-plus boxes, Beddow said, "That's one possible outcome, but an unlikely one."

"Somewhere along the line, both GI and S-A will hook up with retail manufacturers and become part of the retail scenario," he added. **MCM**

CERTIFICATE OF SERVICE

I, Jane Aguilar, do hereby certify that on this 23rd day of September, 1998, I caused the foregoing "Opposition to Petitions for Reconsideration of Circuit City Stores, Inc." to be served via hand delivery to the following:

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Certification of Service
September 23, 1998
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